

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of Petition :

of :

EMKEN MALT PRODUCTS CO., INC. :

for redetermination of deficiencies :
of franchise tax under Article 9-A :
of the tax law for fiscal years :
ended June 30, 1968, June 30, 1969 :
and June 30, 1970. :

Emken Malt Products Co., Inc. having filed petition for redetermination of deficiencies under Article 9-A of the tax law for fiscal years ended June 30, 1968, June 30, 1969 and June 30, 1970, and a hearing having been held on October 26, 1971 before John J. Genevich, Hearing Officer of the Department of Taxation and Finance, at the office of the State Tax Commission, 80 Centre Street, New York City, at which hearing John O'Shea, Certified Public Accountant, appeared personally and testified on behalf of the taxpayer, and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) The taxpayer was incorporated under the laws of New York State on June 28, 1938.

(2) It is a sales affiliate of D. D. Williamson & Co., Inc. and other related manufacturers. No inventories are maintained by the taxpayer. Purchases are made from the related manufacturers after orders have been received. The goods are then packed and delivered to the common carrier by the manufacturer for shipment to taxpayer's customers.

(3) New York State franchise tax reports were filed in which the taxpayer used a one-factor receipts allocation rather than the statutory three-factor allocation of real and tangible personal property, receipts and wages.

(4) Based on a field audit examination, notices of deficiency were issued on September 15, 1971 disallowing an allocation on the basis that the taxpayer did not have a regular place of business outside New York. Deficiencies were computed as follows:

	<u>Fiscal Year Ended 6/30/68</u>	<u>Fiscal Year Ended 6/30/69</u>	<u>Fiscal Year Ended 6/30/70</u>
Entire net income	\$12,294.00	\$25,517.00	\$26,347.00
Tax at 6.25%	768.38		
Tax at 7%		1,786.19	1,844.29
Tax per report	285.00	184.00	357.00
Deficiency	\$ 483.38	\$ 1,602.19	\$ 1,487.29

(5) Petition for redetermination of deficiencies was timely filed claiming that the taxpayer has a permanent place of business in Louisville, Kentucky, and that the use of the one-factor receipts allocation properly reflects its activities within New York.

(6) The taxpayer is furnished with office space at the plant of its parent, D. D. Williamson & Co., Inc., in Louisville, Kentucky, at no charge. Such space is the general executive office of the taxpayer. The president, who is also an officer of the parent, makes general policy and performs substantial management functions from that location.

(7) The taxpayer is also furnished with office space at the plant of its parent in New York at no charge. Accounting, billing, bookkeeping and other clerical functions are performed at this office by the treasurer and two clerical employees.

(8) The corporation has no real and tangible personal property factor but it does have a wage factor representing compensation paid to the clerical employees in New York. A recomputation of the deficiencies using the two statutory factors present of receipts and wages is as follows:

	Fiscal Year Ended 6/30/68	Fiscal Year Ended 6/30/69	Fiscal Year Ended 6/30/70
Entire net income	\$12,294.00	\$25,517.00	\$26,347.00
Business allocation	68.547%	55.152%	59.685%
Allocated entire net income	8,427.17	14,073.14	15,725.21
Tax at 6.25%	526.70		
Tax at 7%		985.12	1,100.76
Tax per report	285.00	184.00	357.00
Deficiency	\$ 241.70	\$ 801.12	\$ 743.76

(9) State income and franchise tax returns are filed only in New York and Kentucky. A similar two-factor formula of receipts and wages was used in the Kentucky returns for the years involved.

(10) Section 210.3(a)(4) of Article 9-A of the tax law states in part:

"* * *; provided, however, that if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred per cent;"

(11) Section 4.11(b) of Ruling of State Tax Commission dated March 14, 1962 states in part:

"A regular place of business is any bona fide office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business."

(12) Section 210.8 of Article 9-A of the tax law states in part:

"If it shall appear to the tax commission that any business or investment allocation percentage determined as hereinabove provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage, to adjust it by (a) excluding one or more of the factors therein, (b) including one or more other factors, * * *, (c) excluding one or more assets in computing such allocation percentage, * * *, or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state, * * *."

The State Tax Commission hereby

DECIDES:

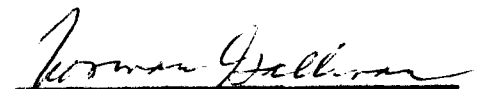
(A) The office space used by the president of the corporation, at the Kentucky plant of its parent, constitutes a regular place of business outside this state permitting the taxpayer to allocate its business income within and without New York.

(B) Since both of the states in which the taxpayer is subject to tax uses a three-factor formula of real and tangible personal property, receipts and wages (or a two-factor formula of the remaining components if one is missing), there is no basis for an equitable adjustment under the discretionary authority provided for by Section 210.8 of Article 9-A of the tax law.

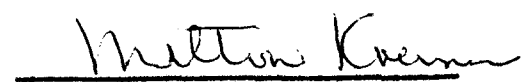
(C) The notices of deficiency issued on September 15, 1971 are revised to the deficiencies computed in paragraph (8) above and are affirmed together with interest due in accordance with the provisions of Section 1084 of Article 27 of the tax law.

Dated: Albany, New York
this 18th day of February 1972.

STATE TAX COMMISSION


President


Commissioner


Commissioner